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# Supreme Court Of The United States

October Term 1971

No. 71-383

SHERRELL NUNNELLEY, et al., etc.
BOARD OF EDUCATION OF
LOUISVILLE, KY., et al., - - - Petitioner

*versus*

CHARLES H. MILLER, et al., etc.
BOARD OF ALDERMEN OF
LOUISVILLE, KY., et al., - - - Respondent

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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This is to certify that, pursuant to United States Supreme Court Rules 33 (3) and 33 (1), copies of this Petition have been served by mail on all counsel of record this 15th day of September, 1971.

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# SUPREME COURT OF THE UNITED STATES

**October Term 1971**

No. _____

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SHERRELL NUNNELLY, et al., etc.
BOARD OF EDUCATION OF LOUISVILLE,
KENTUCKY, et al., - - - - *Petitioner*

*v.*

CHARLES H. MILLER, et al., etc.
BOARD OF ALDERMEN OF LOUISVILLE,
KENTUCKY, et al., - - - - *Respondent*

---

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

---

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Kentucky entered in the above-entitled case on June 18, 1971.

## CITATIONS TO THE OPINIONS BELOW

The Findings of Fact and Conclusions of Law of Judge Lyndon Schmid declaring Kentucky Revised Statute* 160.470 unconstitutionally void is unreported and appears in Appendix B. The opinion of the Court of Appeals of Kentucky is reported in *Nunnelley* v.

*Hereinafter referred to as K.R.S.

*Miller,* Ky., 468 S.W.2d 298 (1971). Also found in Appendix B hereto are the opinion of the Court of Appeals of Kentucky in the case of *Board of Education of Jefferson County, Kentucky, etc.* v. *Board of Education of Louisville, Kentucky, etc., et al.,* and the dissenting opinion therein of Palmore, J., rendered the same day as the case in question on this application. While this procedure is somewhat unusual, the references to the *Miller* opinion by Palmore, J., in the latter opinion are deemed particularly relevant to this application.

## JURISDICTION

The judgment of the Kentucky Court of Appeals was entered on June 18, 1971, and the mandate issued on July 20, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Federal Constitutional provision involved is the Fourteenth Amendment to the Constitution. Kentucky Constitutional provisions involved are: Sections 2, 59, 60, 171, 172 and 183.

The Kentucky Revised Statutes involved are: 132.023; 156.132; 157.440; 160.160; 160.180; 160.200 160.220; 160.240; 160.280; 160.290; 160.460; 160.470; and 418.040.

## QUESTIONS PRESENTED

1. Do the Petitioners, members and Superintendent of the Board of Education of Louisville, Kentucky, who are charged with the duty to provide an adequate system of education for the fifty thousand (50,000) students they represent and to take all steps necessary to so provide (K.R.S. 160.160; 160.290); and who are subject to dismissal and removal from office if they fail to faithfully perform these duties (K.R.S. 156.132 (1, 2, 3)); and who are admittedly prevented from so performing said duties by the Kentucky "Rollback Statute" (Cf., R. 10, ¶10; R. 119, ¶2); possess sufficient standing to assert a denial of equal protection guaranteed by the Fourteenth Amendment to the Constitution of the United States?

Petitioners contend that this question should be answered in the *affirmative.*

2. Does a state system of *ad valorem* property taxes from which education revenues are derived, and which perpetuates a "freezing" of revenues receivable by limiting them to those obtained by a process of systematically arbitrary assessments, wherein substantially disproportionate tax rates among approximately two hundred school districts resulted not from variances in true property values but from said arbitrary assessments, and which system has heretofore been held unconstitutional, in effect constitute an inequality in contravention of the guarantees of the Equal Protection Clause of the Fourteenth Amendment to the

Constitution of the United States?

The Kentucky Court of Appeals in *Miller* v. *Nunnelley,* Ky., 458 S.W.2d 298 (1971), answered this question in the negative, and the Petitioners contend that the answer should be *Yes.*

## STATEMENT

The instant application represents the culmination of an 80-year emasculation by the Kentucky Legislature and various local authorities of a system of state supported public education which was clearly indicated by the Kentucky Constitutional Convention of 1891 to have been delegated the authority and provided the means to afford all the children of Kentucky an equally sound education.

The Constitutional Convention provided that there should be created a system of public education for the children of Kentucky. The power to regulate this system and to provide for its financing was vested in the Kentucky Legislature. The Convention placed a maximum tax rate on *ad valorem* taxes of $1.50 per one hundred dollars ($100) assessed value.

From 1891 to 1965 a procedure followed by local county tax assessors created a widely disproportionate variance in property assessments, which is one of the central elements in this suit. That is, an assessor in one county would knowingly under-assess the property of taxpayers in his district in order to minimize their tax liability, while an assessor in another county would fairly assess the property located therein. As the pro-

cedure for determining revenues then existed, (1) property would be assessed; (2) needed revenue was determined; and, (3) a tax rate which was the function of the ratio of assessments to revenue was derived.

The inevitable inequality which resulted from such a system was considered by the Kentucky Court of Appeals in the decision of *Russmann* v. *Luckett,* Ky., 391 S.W.2d 694 (1965), a landmark Kentucky decision decided June 8, 1965. The Court recognized the historical developments of the past seventy-five years relative to tax assessment procedures, and ruled that all assessments thereafter should be made at one-hundred per cent of fair cash value as of January, 1966. In referring to the system it was holding to be unconstitutional, the Court in *Russman* said:

> "It is perhaps unnecessary to detail the many serious problems that have arisen and will continue to arise by reason of the disparity in the tax burden upon taxpayers in different counties and taxing districts, and the extreme difficulties encountered by certain taxing authorities whose maximum rates are limited by the Constitution or Statutes."
>
> — 391 S.W.2d 694, 695

Thereafter, in December, 1965, the Kentucky Legislature met in its First Extraordinary Session and enacted the now heavily contested "Rollback Statutes", [K.R.S. 132.023 and 160.470 (as applied to schools)]. Basically, this enactment provided that, for the years 1966 and following, while assessments were to be made at one hundred per cent fair cash value, the revenues

received therefrom were not to exceed those which had resulted from the application of the 1965 rates to the arbitrarily manipulated assessments of 1965. The net effect of these statutes is that the basis for 1966 and subsequent tax years is the 1965 revenue. This effectively "froze" the taxing power of local school districts at a revenue level equivalent to that derived from the system which the Court of Appeals of Kentucky had specifically held to be unconstitutional. Thus, the legislature, in effect, continued in substance the same discrepancies which had existed under the system deplored in *Russmann* v. *Luckett, supra,* only changing the form.

In this factual context, the Plaintiffs-Petitioners initiated a suit in the Jefferson County District Court, Jefferson County, Kentucky on November 4, 1970, demanding that K.R.S. 160.470 be declared unconstitutional and void, and demanding the Defendants-Respondents be mandatorily enjoined to levy a school tax $.10/$100-assessed-valuation in excess of that permitted by the aforementioned statutes (R., 4-13). Numerous exhibits were attached to Petitioner's Complaint in the state Court and these exhibits graphically demonstrated the inequality which resulted among the various school districts within the Commonwealth due to the arbitrary assessment procedure followed during 1965, and further illustrate the effective continuation of these disparities through the application of the "Rollback Statutes" (R., 14-117). In addition, exhibits H and I (R., 70-81) demonstrate the loss of revenue

incurred by the approximately two hundred school districts involved.

Under Kentucky law a local board of education may use mandamus to compel its local tax levying authority to levy the tax it requests. *Allen County Fiscal Court* v. *Board of Education*, 242 Ky. 546, 46 S.W.2d 1070 (1932) [in re K.R.S. 160.470]. It should be noted at this point that the Petitioners herein are the only real parties in interest who may raise the issue of the constitutionality of a tax levying statute on the basis of its violation of the Equal Protection Clause as that clause is applied to school boards in respect to any adverse effect such statutes might have on the school board's ability to satisfy their statutory duty to maintain an adequate system of education. We say this because K.R.S. 160.460 provides that school taxes, such as those herein involved, shall be levied by the governing body of the city. This levy is required to be made at the rate specified by the District Board of Education, K.R.S. 160.460. This is the only method by which *ad valorem* school taxes may be levied. Therefore, if the local governing body of a city refuses to levy the *ad valorem* taxes specified by the local school district, then the district's remedy is that of mandamus as sought in the instant case. A taxpayer, individual or someone other than a board of eduction's members or officers would have no right to sue the local governing authority for a mandatory injunction because the local governing authority has no obligation to levy an *ad valorem* tax rate at the request of a taxpayer or individual not connected with a school district.

The Aldermen refused to adopt the ordinances requested because the increase would violate or conflict with the "Rollback Statutes" (R., 5-13). The factual averments of this Complaint were admitted by the Board of Aldermen (R., 119). However, the legal averments thereof were denied, and hence a justicable issue was present, which is a necessary prerequisite to an action for declaratory judgment in Kentucky (K.R.S. 418.040).

The gravamen of the Petitioner's Complaint in the state Circuit Court was that the "Rollback Statutes" violated Sections 2, 59, 60, 171, 172, and 183 of the Constitution of Kentucky and the Equal Protection Clause of the Fourteenth Amendment to the Federal Constitution (R., 11-12). The Trial Court restricted its Conclusions of Law to Sections 59, 60, 171, and 172 of the Kentucky Constitution. It held that the "Rollback Statute" was a special law in violation of Section 59; that no amendment of the original law could validate the invalid statute, citing Section 60; that the law violated the provisions of Section 171 requiring uniformity of taxation and that the law was in conflict with the spirit of Section 172 of the Kentucky Constitution. It should be noted that Sections 59 and 60 of the Constitution of Kentucky, prohibiting the enactment of special local laws (in regard to public education), are similar in import, and rest on an equal-protection-of-law foundation (50 Am. Jur., Statutes, §52). The Trial Court did not, in its holding that the law was unconstitutional and void, specifically direct

itself to the applicability of the Fourteenth Amendment.

On appeal to the Court of Appeals of Kentucky the decision of the Trial Court was reversed (R., 164-170). The Briefs of the parties on appeal were addressed primarily to the law relied upon in the Trial Court's ruling, with the Fourteenth Amendment issue being argued in the Amicus Curiae Briefs (Appellants' Brief, R., 157; Amicus Curiae Brief of the Kentucky Farm Bureau Federation, R., 158, Appellee's Brief, R., 159; Amicus Curiae Brief of Kentucky School Boards Association, R., 162; Amicus Curiae Brief of the Kentucky Education Association, R., 163). Basically, the Court of Appeals of Kentucky reversed the Trial Court on the basis of K.R.S. 157.440, which permits voter referenda to alter tax rates. This statute was also cited as authority for rejecting the Fourteenth Amendment argument.

## REASONS FOR GRANTING THE WRIT

### STANDING

Let us now examine the standing of the Board of Education of Louisville, Kentucky. It is a body politic —it may sue and be sued—*and do all things necessary to accomplish the purposes for which it is created* (K.R.S. 160.160; 160.290). It is responsible for the welfare and education of fifty thousand (50,000) inner city children (R., 5; 119). No challenge to this Petitioner's standing or capacity to maintain this action has been made in the courts below. Nevertheleess,

cognizance of an apparent conflict of decisions relating to the existence of standing of a municipal corporation to assert Fourteenth Amendment rights against its creator, and the application of this general rule to school boards, prompts a preliminary discussion of this question. Cf., *Williams* v. *Mayor and City Council of Baltimore,* 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933), cited in *Triplett* v. *Tiemann,* (D.Neb.) 302 F.Supp. 1239, 1242 (1969), with *Board of Education of Central School District No. 1* v. *Allen,* 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968).

The *Williams* decision, *supra,* held that the mayor and city council of Baltimore did not have standing to challenge a Maryland statute exempting from taxation property of a railroad company whose line connects a city of the state with its capital in another county. Citing a series of decisions beginning with *Trenton* v. *New Jersey,* 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937, 29 A.L.R. 1271 (1923), Justice Cardozo stated at 289 U.S. 40:

> "A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator

This reasoning was applied in *Triplett* v. *Tiemann, supra.,* to deny standing to a school board attempting to challenge the Nebraska School Foundation and Equalization Act, which sought to pro-ratably, according to federal-aid funds allotments, credit or debit various school boards for state aid purposes.

In juxtaposition to the *Williams* and *Triplett* decisions is the *Allen* holding, *supra.*, which held that where school authorities had a " 'personal stake in the outcome' of [the] litigation" [392 U.S. 241, n. 5, citing *Baker* v. *Carr,* 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed. 2d 663, 678 (1962)], they possessed standing to assert constitutional claims. The claims raised in *Williams* and *Triplett* involved the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States, while the *Allen* suit was concerned with the First Amendment to the Federal Constitution.

Petitioners recognize that this substantive differentiation might be relevant in instances where a school board attempts to assert equal protection claims under circumstances which represent a challenge to the legislature's creative powers. However, where, as here, the question raised does not relate to the existence of the legislature's power, but to its exercise, Petitioners contend that the rationale of the *Williams* prohibition against permitting creations of the state to assert Fourteenth Amendment Equal Protection claims against the state is not applicable——particularly in the case of a school board's attempt to fulfill its statutory and constitutional obligations.

"[T]he application of the Equal Protection Clause turns peculiarly on the particular circumstances of each case." *Perry* v. *Grenada Municipal Separate School District,* (N.D. Miss.) 300 F.Supp. 748, 750 (1969), citing *Goesaert* v. *Cleary,* 335 U.S. 464, 69 S.Ct. 198, 93 L.Ed. 163 (1948). Petitioners contend that their dual status as representatives of taxpayers,

as well as board members, coupled with this Court's acknowledgement of the ever-increasing constitutional duty of school boards, generally, to assure pupils within their charge an education equal in all respects, justifies an abrogation of the *Williams* rule, as applied in *Triplett,* insofar as school boards of a similar status in similar circumstances are concerned. That the representatives constituting the Board of Education of Louisville, Kentucky, are charged with the obligation of adequately operating the Louisville Independent School District and educating the children who attend school therein, and the fact that these representatives have not been able to so perform these duties as a result of the "Rollback Statutes", as alleged in the Complaint (R. 10, ¶10), is *admitted* by the Respondents (R. 119, ¶2).

In view of these uncontroverted facts, it is readily apparent that the Petitioners herein could be removed from office for willful neglect or incompetence if they made no attempt to remedy the situation. K.R.S. 156.132 (1, 2, 3). Thus, their personal stake in the outcome of this litigation is as great, if not greater, than that of the Petitioners in *Allen.*

First, the members of the Board of Education of Louisville, Kentucky, as well as all members of all boards of education in Kentucky, are residents and represent taxpayers of the school district. K.R.S. 160.180. They are elected by fellow residents of the district. K.R.S. 160.200, .220, and .240. They receive no salary for their services other than a *per diem* allowance which is not to exceed two hundred dollars

[$200.00] *per annum*. K.R.S. 160.280. In other words, the only difference between these individuals and "ordinary taxpayers" is that the former have, practically *gratis*, seen fit to attempt to assure the community an efficient system of schools. Thus, it would seem to be totally irrational to deny these individuals standing on the basis of *Williams*, as was done in *Triplett*.

Second, implicit in the *Williams* decision is the principle that to allow a creation of the state, which owes its very existence to the state, to then allege that the state has denied it equal protection, would impede the administration of state services and would impair the delegation of powers process. Petitioners contend that this principle would not be subverted by granting boards of education of a similar status as itself in these circumstances standing to challenge the constitutionality of state statutes on equal protection grounds.

Petitioners here are representatives of the taxpayers as well as school board members. They do not now, nor have they at any time during this suit, challenged the existence of the power of the legislature to regulate the structure or power of school boards. Rather, recognizing that the legislature is charged by the Constitution of Kentucky to provide for an adequate system of schools, and recognizing this Court's holding to the effect that once a state undertakes to so provide an educational system it must do so in a manner which will realize constitutional equality [*Brown* v. *Board of Education of Topeka*, 347 U.S.

483, 74 S.Ct. 686, 98 L.Ed. 873, 38 A.L.R. 2d 1180 (1954)], these Petitioners are attempting to assure that the *opportunity* for an equal education exists in Kentucky. They do not attempt to assert that tax rates or revenues should be equal in a dollar figure sense, but rather that one county, and, *ipso facto,* the children and taxpayers thereof, should not be denied an opportunity of equality with other children and taxpayers of the state simply on the basis of past tax contributions—a form of denial held to be in derrogation of the Equal Protection Clause in *Shapiro* v. *Thompson,* 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed. 2d 600 (1969) especially when these tax contributions were determined by a practice of deliberately depressed and arbitrarily disproportionate assessments held to be unconstitutional by the state court of appeals. Not only does the "Rollback" law prevent these Petitioners from effectively performing their duties as constitutionally charged, but also it denies them, as taxpayers, the guarantee of the Equal Protection Clause to be taxed uniformly with other taxpayers of the state.

## TAXATION

Petitioners herein have at no time in the Courts below challenged the power of the Kentucky Legislature to regulate taxation. However, it was the contention in the Courts below, as it is here, that the generally recognized power to regulate taxation does not abrogate the duty to abide by state and Federal constitutional mandates to exercise this duty in such

a way as to realize equality, uniformity, and equal protection of the laws.

It has been stated that if a statute violates state equality and uniformity causes, it also violates the Federal Equal Protection Clause. *State Tax Commissioners* v. *Jackson,* 283 U.S. 527, 51 S.Ct. 540, 75 L.Ed. 1248 (1931) While these petitioners recognize that the equality requirements of the Equal Protection Clause do not necessarily require that tax rates be numerically identical, they maintain that despite the applicability of this interpretive area of taxation equality, this Court should review the decision of the Kentucky Court of Appeals in light of the long recognized principle that even though a statute is constitutional on its face, the principle of uniformity may nevertheless be violated where inequality is the result of administrative action. That is, where inequality or discrimination in assessments or evaluations is the result of an intentional, systematic, deliberate, persistent, or habitual procedure on the part of administrative officials, a statute may be held unconstitutional where such procedure is employed. *Bohler* v. *Callaway,* 267 U.S. 497, 45 S.Ct. 431, 69 L.Ed. 745 (1925); *Chicago G.W.R. Co.* v. *Kendall,* 266 U.S. 94, 45 S.Ct. 55, 69 L.Ed. 183 (1924); *Greene* v. *Louisville & I.U.R. Co.,* 244 U.S. 499, 37 S.Ct. 673, 61 L.Ed. 1280 (1917).

In the *Greene* decision, it was held that where one state constitutional provision provides that the Legislature shall have the power to regulate the method of assessment and collection of taxes as to a particular class, this does not relieve the Legislature of its duties

to realize the requirements of equality and uniformity which may exist in other sections of the Constitution. A similar position has been taken by the Kentucky Court of Appeals in *Board of Education of Louisville* v. *Board of Education of Jefferson County,* Ky., 458 S.W. 2d 6 (1970), wherein the Court recognized that while legislative enactments in fulfillment of the Kentucky constitutional charge to provide for an adequate system of schools is normally unchallengeable, any such provision *may* be questioned where the basis for the challenge is that the statute contravenes some other constitutional provision of equal dignity.

It is these Petitioner's contention that the "Roll-back Statute" is merely an invidious subterfuge on the part of the Kentucky Legislature to continue *in effect* a process of arbitrarily disproportionate assessments. The Kentucky Court of Appeals, in referring to this procedure as a "flagrant violation of Section 172 [of the Kentucky Constitution]," stated in *Russmann* v. *Luckett, supra*:

> "It is not only admitted but has become a matter of common knowledge that real estate and tangible personal property in Kentucky are assessed for tax purposes at varying percentages substantially less than 100 per cent fair cash value. The record indicates that in different taxing districts such property is assessed at percentages ranging from 33 to 12½ per cent of such value. The statewide median real estate assessment ratio is approximately 27 per cent."

In its opinion rendered June 18, 1971, in *Nunnelley* v. *Miller, supra,* at p. 301:

> "It is true that the basic tax rate that a school *board* has the power itself to select is frozen."

The Court of Appeals continued to note that the uniformity provisions of the Kentucky Constitution [Section 171] require uniformity within the territorial limits of the authority levying the tax. On this basis, the Court of Appeals ruled that the Petitioner's argument regarding uniformity failed. It is curious that, in so doing, the Court of Appeals completely disregarded its own holding in *City of Louisville, et al.* v. *Board of Education of City of Louisville, et al.,* 154 Ky. 316, 157 S.W. 379 (1913), cited to it at p. 27 in the Petitioner's Brief (R., 159), which expressly stated that a school tax is a state, not a municipal tax, as these constitutional provisions are concerned.

This observation is offered not only for its face value, but also as emphasis to the argument, *supra,* relating to these Petitioners' standing, to-wit: These Petitioners are the only proper parties to institute such litigation. A taxpayer can only assert inequality extant within his own taxing district. However, a Board of Education, which is the only body recognized to mandamus a Board of Aldermen for the collection of this *state* tax, is similarly the only party who may properly allege the inequality extant *among others similarly situated* (i.e., boards of education).

To reiterate, the Board of Education of Louisville, Kentucky, has never suggested that it has the power

to dictate the tax rates which shall be used independent of any legislatively authorized rates. However, when the legislative system of taxation is a pernicious method of continuing, in effect, disproportionate assessments and, *ipso facto*, unconstitutionally deprivative levels of educational finances, it *indeed* asserts that it *must* be able to challenge the act.

Furthermore, to follow the Kentucky Court of Appeals' logic for a moment, the only way a taxpayer can attempt to resolve the educational anemia of his district, which is frozen under the "Rollback Statute", is to assess against himself an even higher level of taxation. Such a system is incredulously horrid to the constitutional conscience.

Finally, Petitioners note that this problem is not only limited to Kentucky alone, but has also been recognized in other states, such as California, whose Supreme Court recently decided an as yet unreported decision to the effect that a disparity in educational services resulting from variances in property taxes is an unconstitutional denial of equal protection. While these Petitioners are not informed as to the rationale of that decision, its existence is indicative of the extent of the problem.

Similarly, the case of *Askew* v. *Hargrave*, ____ U.S. ____, 91 S.Ct. ____, 28 L.Ed. 2d 196 (1971), in which this Court vacated the judgment on the grounds of abstention due to the lack of evidence in the court below, is another example of the ever-increasing significance of the problems in this area. These Petitioners feel that the Exhibits previously indicated should re-

solve any questions of an evidentiary nature, especially in view of the fact that the inability of the Board of Education of Louisville, Kentucky, to provide an adequate education to the children within its charge is admitted by the Respondents to be a result of the "Rollback Statutes".

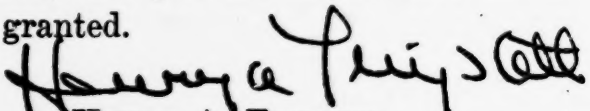
## CONCLUSION

The necessity of this Court's review of the instant case, as set forth above, is magnified by Kentucky Court of Appeals Judge Palmore's opening comments in his Dissenting Opinion in *Board of Education of Jefferson County, Kentucky, etc.*, v. *Board of Education of Louisville, Kentucky, etc., et al.*, to be found in Appendix C. In that case, the question was raised as to whether a special method of changing school district boundaries violated the Kentucky Constitutional provisions against local legislation. The majority of the Court ruled that it did. Judge Palmore noted:

> "If the legislature may validly classify each of 200 or so different school districts solely on the fortuitous basis of what its individual tax assessment may have been at a given time prior to *Russman* v. *Luckett*, Ky., 391 S.W. 2d 694 (1965), as today held in *Miller* v. *Nunnelley*, Ky., ____ S.W. 2d____. (1971),[1] I see no constitutional reason why it may not provide for Jefferson County, upon the basis of its density of population, a special method of changing school district boundaries.

[1]That such a classification exists with regard to the maximum tax rates permitted the various school districts is not made less so by the fact that an escape hatch is available in the form of a public vote.

These Petitioners respectfully submit that, for the reasons set forth above, this petition for a writ of certiorari should be granted.



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# APPENDIX

# APPENDIX A

## KENTUCKY CONSTITUTIONAL PROVISIONS AND STATUTES

§2. Absolute power does not exist in a republic.—Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority.

### LOCAL AND SPECIAL LEGISLATION

§59. Limitations upon.—The general assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely:

1. Jurisdiction; practice of courts, officers' fees. To regulate the jurisdiction, or the practice, or the circuits of the courts of justice, or the rights, powers, duties or compensation of the officers thereof; but the practice in circuit courts in continuous session may, by a general law, be made different from the practice of circuit courts held in terms.

2. Juries. To regulate the summoning, impaneling or compensation of grand or petit jurors.

3. Change of venue. To provide for changes of venue in civil or criminal causes.

4. Punishment for crimes; remission of fines. To regulate the punishment of crimes and misdemeanors, or to remit fines, penalties or forfeitures.

5. Limitation. To regulate the limitation of civil or criminal causes.

6. Estates of persons under disability. To affect the estate of cestui que trust, decedents, infants or other persons under disabilities, or to authorize any

such persons to sell, lease, encumber or dispose of their property.

7. Declaring persons of age; relieving disabilities. To declare any person of age, or to relieve an infant or feme covert of disability, or to enable him to do acts allowed only to adults not under disabilities.

8. Descent or distribution. To change the law of descent, distribution or succession.

9. Adoption of children. To authorize the adoption or legitimation of children.

10. Divorces. To grant divorces.

11. Changing names. To change the name of persons.

12. Legalizing invalid instruments. To give effect to invalid deeds, wills or other instruments.

13. Legalizing invalid official acts. To legalize, except as against the Commonwealth, the unauthorized or invalid act of any officer or public agent of the Commonwealth, or of any city, county or municipality thereof.

14. Refunding money. To refund money legally paid into the state treasury.

15. Taxes; concerning. To authorize or to regulate the levy, the assessment or the collection of taxes, or to give any indulgence or discharge to any assessor or collector of taxes, or to his sureties.

16. Roads; streets; public places. To authorize the opening, altering, maintaining or vacating roads, highways, streets, alleys, town plats, cemeteries, graveyards, or public grounds not owned by the Commonwealth.

17. Charters; navigable streams; tolls; fencing; stock. To grant a charter to any corporation, or to amend the charter of any existing corporation; to

license companies or persons to own or operate ferries, bridges, roads or turnpikes; to declare streams navigable, or to authorize the construction of booms or dams therein, or to remove obstructions therefrom; to affect toll-gates, or to regulate tolls; to regulate fencing or the running at large of stock.

18. Fees of officers. To create, increase or decrease fees, percentages or allowances to public officers, or to extend the time for the collection thereof, or to authorize officers to appoint deputies.

19. Railroads. To give any person or corporation the right to lay a railroad track or tramway, or to amend existing charters for such purposes.

20. Elections; election precincts. To provide for conducting elections, or for designating the places of voting, or changing the boundaries of wards, precincts or districts, except when new counties may be created.

21. Interest. To regulate the rate of interest.

22. Liens. To authorize the creation, extension, enforcement, impairment or release of liens.

23. Game and fish. To provide for the protection of game and fish.

24. Labor; trade; mining. To regulate labor trade, mining or manufacturing.

25. Common schools. To provide for the management of common schools.

26. County seats. To locate or change a county seat.

27. Liquor; regulating sale of. To provide a means of taking the sense of the people of any city, town, district, precinct, or county, whether they wish to authorize, regulate or prohibit therein the sale of vinous, spirituous or malt liquors, or alter the liquor laws.

*Kentucky Constitutional Provisions and Statutes*

28. Citizenship; restoring. Restoring to citizenship persons convicted of infamous crimes.

29. Special law not to be passed; when. In all other cases where a general law can be made applicable, no special law shall be enacted.

§60. Special laws; laws to take effect when approved by people.—The general assembly shall not indirectly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district or county; but laws repealing local or special acts may be enacted. No law shall be enacted granting powers or privileges in any case where the granting of such powers or privileges shall have been provided for by a general law, nor where the courts have jurisdiction to grant the same, or to give the relief asked for. No law, except such as relates to the sale, loan or gift of vinous, spirituous or malt liquors, bridges, turnpikes or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the general assembly, unless otherwise expressly provided in this Constitution.

An act is not unconstitutional because it provides for a vote to decide whether the county shall have free turnpike and gravel roads. Maysville & Lex. Turnpike Co. v. Wiggins, 104 Ky. 540, 20 R. 724, 47 S.W. 434.

An act providing a mode by which the share of the state in the cost of making a street improvement in a city of the first class shall be paid, is constitutional.

Hager, Auditor v. Gast, 119 Ky. 502, 27 R. 129, 84 S.W. 556.

§171. Levy and collection of taxes by general laws; public purposes only; uniform within the class and territory; classification of property; bonds of state and its divisions exempt; referendum on act classifying property.

The general assembly shall provide by law an annual tax, which with other resources, shall be sufficient to defray the estimated expenses of the Commonwealth for each fiscal year. Taxes shall be levied and collected for public purposes only and shall be uniform upon all property of the same class subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws.

The general assembly shall have power to divide property into classes and to determine what class or classes of property shall be subject to local taxation. Bonds of the state and of counties, municipalities, taxing and school districts shall not be subject to taxation.

Any law passed or enacted by the general assembly pursuant to the provisions of or under this amendment or amended section of the constitution, classifying property and providing a lower rate of taxation on personal property, tangible or intangible, than upon real estate, shall be subject to the referendum power of the people, which is hereby declared to exist to apply only to this section, or amended section. The referendum may be demanded by the people against one or more items, sections or parts of any act enacted pursuant to or under the power granted by this amend-

ment, or amended section. The referendum petition shall be filled with the secretary of state not more than four months after the final adjournment of the legislative assembly which passed the bill on which the referendum is demanded. The veto power of the governor shall not extend to measures referred to the people under this section. All elections on measures referred to the people under this act shall be at the regular general election, except when the legislative assembly shall order a special election. Any measure referred to the people shall take effect and become a law when approved by the majority of the votes cast thereon, and not otherwise. The whole number of votes cast for the candidates for governor at the regular election last preceding the filing of any petition shall be the basis upon which the legal voters necessary to sign such petition shall be counted. The power of the referendum shall be ordered by the legislative assembly at any time any acts or bills are enacted, pursuant to the power granted under this section or amended section, prior to the year of one thousand nine hundred and seventeen. After that time, the power of the referendum may be ordered either by the petition signed by five per cent (5%) of the legal voters or by the legislative assembly at the time said acts or bills are enacted. The general assembly enacting the bill shall provide a way by which the act shall be submitted to the people. The filing of a referendum petition against one or more items, sections or parts of an act shall not delay (the remainder of that act from becoming operative. (Amended November, 1915.)

§172. Assessment; how value fixed; penalty.—All property, not exempted from taxation by this Consti-

tution, shall be assessed for taxation at its fair cash value, estimated at the price it would bring at a fair voluntary sale; and any officer, or other person authorized to assess values for taxation, who shall commit any wilful error in the performance of his duty, shall be deemed guilty of misfeasance, and upon conviction thereof shall forfeit his office, and be otherwise punished, as may be provided by law.

§183. Common schools to be provided for.—The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state.

## STATUTES

**132.023 Limits for certain district taxes and for combined city and school taxes.**

(1) Notwithstanding any statutory provisions to the contrary, for 1966 and for all subsequent years, no taxing district, other than the state, counties, school districts, and cities, shall levy a tax rate which exceeds the compensating tax rate defined in KRS 132.010.

(1966 c 62, § 1. Eff. 6-16-66. 1965 1st ex s, c 2, § 13)

(2) For the 1966 tax year and for all subsequent years, the combined city and school tax rate provided for in KRS 132.150 shall be limited by the compensating tax rate defined in KRS 132.010.

(1966 c 62, § 1. Eff. 6-16-66. 1965 1st ex s, c 2, § 13)

(3) Notwithstanding the limitations contained in subsection (2) of this section, that portion of the combined city and school compensating tax rate prescribed in subsection (2) levied for school purposes may be

increased by an amount within the limitations contained in KRS 160.470 (4) after compliance with subsections (4) (a) and (4) (b) of KRS 160.470.

(1966 c 62, § 1. Eff. 6-16-66. 1965 1st ex s, c 2, § 13)

(4) Nothwithstanding the limitations contained in subsection (1) of this section, any watershed conservancy district which did not levy the maximum rate permitted by law in 1965 may levy such maximum rate after it has been reduced to the compensating tax rate as defined in KRS 132.010. (1966 c 62, § 1. Eff. 6-16-66)

**156.132 Removal or suspension of school officers; procedure, grounds, conditions.**

(1) The Superintendent of Public Instruction or the State Board of Education, shall recommend, by written charges, to the proper school authorities having immediate jurisdiction the removal of any superintendent of schools, principal, teacher or other public school officer who in his or their opinion is guilty of immorality, misconduct in office, incompetency or wilful neglect of duty.

(1962 c 244, Art 1, § 1. Eff. 6-14-62)

(2) The Superintendent of Public Instruction shall recommend by written charges the suspension by the State Board of Education of any district board member or superintendent of schools who in his opinion is guilty of immorality, misconduct in office, incompetency or willful neglect of duty. The State Board of Education shall, after a summary hearing as provided by regulations, suspend any district board of education member or Superintendent of Schools, who in the opinion of the majority of the State Board of Education is guilty of gross immorality, misconduct

in office, incompetence or willful neglect of duty. Such action by the State Board of Education may be taken upon a recommendation of the Superintendent of Public Instruction, or such action may be taken by a majority vote of the State Board of Education without recommendation from the Superintendent of Public Instruction.

(1962 c 244, Art 1, § 1. Eff. 6-14-62)

(3) The State Board of Education may suspend a district superintendent of schools under subsection (2) of this section only if after 30 days of receipt of the written charges specified in subsection (1) of this section, the district board of education has refused to act, has acted in bad faith, arbitrarily or capriciously, or if a recommendation to the district board would have been futile.

(1962 c 244, Art 1, § 1. Eff. 6-14-62)

**157.440 Districts may exceed levies authorized by KRS 157.380 or 160.470, when.**

(1) In addition to the local tax effort required by KRS 157.380, for participation in the equalization account of the public school foundation program fund, such districts or any other district may exceed the maximum provided by subsection (2) of KRS 160.470 provided that, upon request of the board, the tax levying authority of the district shall adopt an ordinance or resolution submitting to the qualified voters of the district, in the manner of submitting and voting as prescribed in subsection (1)(b) of KRS 160.477, the question whether a rate which would produce revenues in excess of the maximum provided by subsection (2) of KRS 160.470 shall be levied. If a major-

ity of those voting on the question favor the increased rate, the tax levying authority shall, when the next tax rate for the district is fixed, levy the rate requested by the board not to exceed the rate authorized by the voters.

(1965 1st ex s, c 2, §6. Eff. 12-15-65. 1954 c 214, §14)

(2) For the 1966 tax year and for all subsequent years the rate levied by the levying authority under the provisions of this section for levies which were approved prior to December 16, 1965, shall be the compensating tax rate as defined in KRS 132.010, except as provided in subsection (3) of this section and except that a rate which has been approved by the voters under this section but which was not levied by the district board of education in 1965 may be levied after it has been reduced to the compensating tax rate as defined in KRS 132.010.

(1965 1st ex s, c 2, §6. Eff. 12-15-65)

(3) Notwithstanding the limitations contained in subsection (2) of this section no tax rate shall be set lower than that necessary to provide such funds as are required to meet principal and interest payments on outstanding bonded indebtedness and payments of rentals in connection with any outstanding school revenue bonds issued under the provisions of KRS Chapter 162.

(1965 1st ex s, c 2, §6. Eff. 12-15-65)

(4) The Superintendent of Public Instruction shall certify the compensating tax rate to the levying authorities. (1965 1st ex s, c 2, §6. Eff. 12-15-65)

**160.160** [4399-17; 4399-18] **Boards of education; nature; corporate powers.**

Each school district shall be under the management and control of a board of education consisting of five members, to be known as the "Board of Education of ....., Kentucky." Each board of education shall be a body politic and corporate with perpetual succession. It may sue and be sued; make contracts; purchase, receive, hold and sell property; issue its bonds to build and construct improvements; and do all things necessary to accomplish the purposes for which it is created.

**160.180** [4399-22] **Qualifications of board members; when not to vote.**

(1) No person shall be eligible to membership on a board of education:

(a) Unless he has attained the age of twenty-four years; and

(b) Unless he has been a citizen of Kentucky for at least three years preceding his election and is a voter of the district for which he is elected; and

(c) Unless he has completed at least the eighth grade in the common schools as shown by the records of the school in which the eighth grade was completed or by affidavits of the teacher or teachers under whom the work was completed, or unless he has the equivalent of an eighth grade education as determined by an examination held under rules and regulations adopted by the State Board of Education; or

(d) Who holds or discharges the duties of any civil or political office, deputyship or agency under the city or county of his residence; or

(e) Who, at the time of his election, is directly or indirectly interested in the sale to the board of books, stationery or any other property, materials, supplies, equipment or services for which school funds are expended; or

(f) Who has been removed from membership on a board of education for cause.

(2) If, after the election of any member of the board, he becomes interested in any contract with or claims against the board, of the kind mentioned in paragraph (e) of subsection (1) of this section, or becomes a candidate for nomination or election to any office or agency the holding and the discharging of the duties of which would have rendered him ineligible before election, or if he moves his residence from the district for which he was chosen, or if he does anything that would render him ineligible for reelection, his office shall without further action be vacant.

(3) A board member shall be eligible for reelection unless he becomes disqualified.

(4) No member of a board of education shall vote regarding the appointment or employment in any capacity of any person related to him as father, mother, brother, sister, husband, wife, son, daughter, nephew, niece, aunt, uncle, son-in-law, daughter-in-law or first cousin, and the majority vote of the remainder of the board is required in case of appointment or employment of such person.

**160.200** [4399-24; 4399-27] **Time of election of board members; term.**

(1) All elections for members of boards of education shall be in even numbered years, for a term of four

years. Except as provided in subsection (3) of this section, the elections shall be held at the regular November election. In all county districts and in those independent districts embracing cities of the second or third class, two members shall be elected in 1942 and three in 1944. In all other school districts three membes shall be elected in 1942 and two in 1944.

(2) In each even numbered year therafter, there shall be held an election in every county and independent district to fill the membership of the boards of education for the terms that will expire on the first Monday in January following, and the regularly elected members shall hold office for four years and until their successors are elected and have qualified.

(3) Any independent school district embracing a city of the fifth class may, at the discretion of its board of education, hold its election of board members at its public school building on the first Saturday in May. The election shall be held by three officers appointed by the board of education and the expenses of the election shall be paid from the treasury of the school district. In all other respects the provisions of this chapter relating to holding election for board members shall apply.

**160.220** [4399-25] **Secret ballots; nominating petitions.**

All elections for members of boards of education shall be by secret ballot. The ballot shall be on a separate sheet from all other ballots used in any election. The county clerk shall cause to be printed on the ballot the names of legally eligible candidates who have filed with the clerk a petition as provided in KRS 118.080. (1966 c 255, §151. Eff. 6-16-66. 1964 c 83, §1)

**160.240** [4399-25] **General election laws apply; procedure; expense.**

(1) The general election laws shall apply to all elections of school board members. The sheriff of the county in which the school district is situated shall provide for each precinct in the district a separate box for the reception of ballots used in the election of members of the board of education. The judge of election of the opposite political party to the clerk of election in each precinct shall issue the school ballots and observe, as to these ballots, the regulations for the issue and deposit of ballots as are prescribed for elections generally.

(2) In school districts embracing cities of the first five classes the expense of the election shall be paid by the city from its general funds. In all other districts the expense shall be paid by the fiscal court out of its general funds.

**160.280** [4399-32] **Per diem and expenses allowed county board members.**

Members of boards of education shall receive no salaries, but members of county boards of education may receive a per diem of ten dollars and their actual expenses for each regular or special meeting attended, and may be reimbursed for other actual and necessary expenditures incurred in the district in the performance of their duties authorized by the board. In no case shall the expenses incurred within the district or per diem of any member exceed two hundred dollars per annum. Members of boards of education may be reimbursed for actual and necessary expenditures incurred outside the district in the performance of their duties authorized by the board. All claims shall be

made out according to law and filed with the secretary of the board and shall be approved and paid as other claims against the board. (1962 c 57. Eff. 6-14-62. 1954 c 220, §1)

**160.290** [4399-20; 4399-33] **General powers and duties of board.**

(1) Each board of education shall have general control and management of the public schools in its district and may establish such schools and provide for such courses and other services as it deems necessary for the promotion of education and the general health and welfare of pupils, consistent with the rules and regulations of the State Board of Education. Each board shall have control and management of all school funds and all public school property of its district and may use such funds and property to promote public education in such ways as it deems necessary and proper. Each board shall exercise generally all powers in the administration of its public school system, appoint such officers, agents and employes as it deems necessary and proper, prescribe their duties, and fix their compensation and terms of office.

(2) Each board shall make and adopt, and may amend or repeal, rules, regulations and bylaws for its meetings and proceedings for the government, regulation and management of the public schools and school property of the district, for the transaction of its business, and for the qualification and employment of teachers and the conduct of pupils. The rules, regulations, and bylaws heretofore made by any governing body of a school district, or hereafter made by a board of education, shall be consistent with the general school laws of the state and shall be binding on

the board of education and parties dealing with it until amended or repealed by an affirmative vote of three members of the board. The rules, regulations and bylaws shall be spread on the minutes of the board and be open to the public.

**160.460** [4399-40] **School taxes; when and by whom levied; property subject to levy.**

(1) All school taxes shall be levied by the fiscal court of each county except in independent school districts embraced by cities of the first four classes. In such districts the tax shall be levied by the governing body of the city. The tax levying authority shall levy such ad valorem tax and such poll tax as specified by the district board of education within the limits prescribed in KRS 160.475, which will obtain for the school district the amount of money needed as shown in such district's general school budget submitted under the provisions of KRS 160.470.

(1950 c 71. Eff. 6-15-50. 1949 ex s, c 7.)

(2) The tax levying authority shall make an annual school levy not later than July 1. The school levy shall not be made until the general school budget has been received by the tax levying authority. The failure of the authority to make the levy by the date prescribed shall not invalidate any levy made thereafter.

(1950 c 71. Eff. 6-15-50. 1949 ex s, c 7.)

(3) All school taxes shall be levied on all property subject to local taxation in the jurisdiction of the tax levying authority. If the school levy is to be made upon the city assessment as authorized in subsection (1), the clerk of such city shall furnish to the school district

or districts which the city embraces, the assessed valuation of property subject to local taxation in the school district, as determined by its tax assessor. If the school levy is to be made upon the county assessment the county clerk shall furnish to the proper school district or districts the assessed valuation of property subject to local taxation in such district or districts, as certified by the Kentucky Board of Tax Appeals. (1950 c 71. Eff. 6-15-50. 1949 ex s, c 7)

**160.470 [4399-40] School budgets, tax rate limits, how fixed.**

(1) Each district board of education shall prepare a general school budget on forms prescribed and furnished by the State Board of Education, showing the amount of money needed for current expenses, debt service, capital outlay, and other necessary expenses of the schools during the succeeding fiscal year, the estimated total amount that will be received from the common school fund and other sources, the assessed valuation of property subject to local taxation in the school district furnished as provided in subsection (3) of KRS 160.460, an estimate made by the Department of Revenue of public service company assessments and assessments of other property in the school district not furnished under the provisions of subsection (3) of KRS 160.460, and the amount that will be needed to be raised by local taxation, including the rate of levy necessary to raise such an amount.

(1965 1st ex s, c 2, §3. Eff. 12-15-65. 1956 c 177; 1949 ex s, c 7, §2)

(2) Notwithstanding any statutory provisions to the contrary, no district board of education shall submit a budget which would require more revenue from

local ad valorem taxes than would be produced by application of the preceding year's rate to the preceding year's assessment, exclusive of voted levies and net assessment growth as defined in KRS 132.425, except as provided in subsection (3) of KRS 157.380 and as provided in subsection (4) of this section. In the event of a merger of school districts, the limitations contained in this section shall be based upon the combined revenue of the merging districts, as computed under the provisions of this section.

(1965 1st ex s, c 2, §3. Eff. 12-15-65)

(3) The Superintendent of Public Instruction shall certify to each district board of education, by June 1 of each year, the maximum permissible local ad valorem tax revenue. This amount shall be computed as follows:

(a) The Superintendent of Public Instruction shall determine the total amount of ad valorem tax revenue which would be produced by application of the preceding year's rate to the preceding year's assessment.

(b) The Superintendent of Public Instruction shall determine the total amount of ad valorem tax revenue which would be produced by application of the preceding year's effective tax rate to the net assessment growth in each school district. The net assessment growth as determined in accordance with KRS 132.425 shall be certified to the Superintendent of Public Instruction by the Department of Revenue by May 20 of each year.

(c) The sum of the amounts computed under (a) and (b) of this subsection shall be the maximum permissible local ad valorem tax revenue for purposes of

subsection (2) of this section, except as otherwise therein prescribed.

(1965 1st ex s, c 2, §3. Eff. 12-15-65)

(4) Notwithstanding the limitations contained in subsection (2) of this section, any district board of education which in preparing its proposed budget deems that it will require an amount of revenue greater than that permitted in subsection (2) may submit to the levying authority for the school years 1966-1967 and 1967-1968 a budget which could require an increase in such revenue of not more than ten per cent after compliance with the following:

(a) The district board of education shall give notice of any proposed increase in revenue. Notwithstanding any statutory provisions to the contrary, notice shall be given by causing to be published, at least one time in a newspaper of general circulation published in the county or by posting at the courthouse door if there be no such newspaper, the fact that said increase of not exceeding ten percent is being proposed. Said advertisement shall state that the district board of education will meet at a place and on a day fixed in the advertisement, not earlier than one week and not later than two weeks from the date of the advertisement, for the purpose of hearing comments and complaints regarding the proposed increase and explaining the reasons for such proposal.

(b) The district board of education shall conduct a public hearing at the place and on the date advertised for the purpose of hearing comments and complaints regarding the proposed increase and explaining the reasons for such proposal.

(1965 1st ex s, c 2, §3. Eff. 12-15-65)

(5) Three copies of the budget shall be filed with the clerk of the tax levying authority of the district within three days after the district board of education has received its assessment data. The clerk shall present the budget to the proper tax levying authority when the authority convenes to fix its school levy. The failure of the district board of education to furnish the budget within the time prescribed shall not invalidate any levy made thereafter.

(1965 1st ex s, c 2, §3. Eff. 12-15-65. 1956 c 177; 1949 ex s, c 7, §2)

(6) Within three days after the tax levying authority has fixed the tax rate, the district board of education shall forward two copies of the budget to the State Board of Education for its approval or disapproval. The budget shall be disapproved if it is financially unsound or fails to provide for (a) payment of maturing principal of and interest on any outstanding voted school improvement bonds of the school district authorized and issued pursuant to KRS 162.080 and 162.090, with the written approval of the State Board of Education, or (b) payment of rentals in connection with any outstanding school building revenue bonds issued for the benefit of the independent school district or county school district, as the case may be, by the appropriate city or county as authorized and provided under the provisions of KRS 162.120 to 162.300, with the written approval of the State Board of Education, or fails to comply with the law; and the State Board of Education shall state its reason, or reasons, for such disapproval. In such event the district board of education shall amend its budget, within the limitations of this section, to obviate the

reasons for disapproval.

(1965 1st ex s, c 2, §3. Eff. 12-15-65. 1956 c 177; 1949 ex s, c 7, §2)

(7) If the budget as amended specifies a tax levy different from that levied under the disapproved budget, the tax levying authority shall amend its levy in accordance therewith, so that the levy as amended shall comply with the provisions of subsection (1) of KRS 160.460. No general school budget shall become effective until approved by the State Board of Education.

(1965 1st ex s, c 2, §3. Eff. 12-15-65. 1956 c 177; 1949 ex s, c 7, §2)

(8) Each district board of education shall, if required by the State Board of Education, prepare and submit to it not later than September 15, a close estimate or working budget which shall conform to the rules and regulations prescribed by the State Board of Education, and which shall be consistent in its major divisions with the general school budget previously prepared. (1965 1st ex s, c 2, §3. Eff. 12-15-65. 1956 c 177; 1949 ex s, c 7, §2)

**418.040** (C. C. 639a-1) **Plaintiff may obtain declaration of rights if actual controversy exists.**

In any action in a court of record of this Commonwealth having general jurisdiction wherein it is made to appear that an actual controversy exists, the plaintiff may ask for a declaration of rights, either alone or with other relief; and the court may make a binding declaration of rights, whether or not consequential relief is or could be asked. (1952 c 84, §1. Eff. 7-1-53. 1922 c 83, §1.)

*Findings of Fact, Conclusions of Law, and Judgment*
*Jefferson Circuit Court*

## APPENDIX B

## FINDING OF FACTS, CONCLUSIONS OF LAW AND JUDGMENT

Findings of Facts, Conclusions of Law and Judgment, Filed in Court, December 9, 1970, is as follows, to-wit:

This is an action by the Board of Education of Louisville, Kentucky, its members and Superintendent against the Board of Aldermen of Louisville, Kentucky, and the members thereof to test the constitutionality of KRS 160.470 of the Kentucky Revised Statutes popularly known as the "Roll Back" statute. The Defendants have answered and generally admitted the factual averments in Plaintiffs' Complaint but have put in issue the legal averments. Those factual allegations not specifically admitted appeared to be supported by the numerous exhibits attached to the Complaint which have not been put in issue by the Defendants.

An actual controversy exists between the parties and a justiciable question is presented and this is, therefore, a proper case for a declaratory judgment under KRS 418.040.

The Attorney General of the Commonwealth of Kentucky having been given notice of this action in accordance with the Statutes has declined to participate. However, he does desire copies of all papers in the action and, therefore, he will be given a copy of this Findings of Fact, Conclusions of Law and Judgment.

Therefore, the Court having heard the arguments of counsel on December 5, 1970, considered the exhibits

and being otherwise sufficiently advised now makes the following Findings of Fact and Conclusions of Law.

## FINDINGS OF FACT

1. The parties and their capacities are as stated in Paragraphs 1 and 2 of Plaintiffs' Complaint.

2. That the Defendants in their capacity as a tax-levying authority for the Board of Education of Louisville, Kentucky, denied certain ordinances approving a ten (10) cent per One Hundred ($100.00) Dollar valuation increase in ad valorem taxes for the support and maintenance and operation of the Board of Education of Louisville, Kentucky, on the ground that these ordinances conflicted with KRS 160.470 popularly known as the "Roll Back" Statute.

3. That thereafter the Plaintiffs brought this action and contend that the Defendants were required to adopt the ordinances granting a ten (10) cent per One Hundred ($100.00) Dollar valuation increase for ad valorem taxes on the ground that the "Roll Back" statute is unconstitutional and that Defendants, therefore, had no discretion in the matter pursuant to Chapter 160.460, Sections 1, 2 and 3 of the Kentucky Revised Statutes.

4. That Plaintiffs complied with all lawful conditions precedent to bring the ordinances described herein before the Defendants for appropriate action.

5. KRS 160.470 popularly known as the "Roll Back" statute involved herein was adopted by the General Assembly of the Commonwealth of Kentucky and became law December 15, 1965. That certain

amendments were made to this statute, and these amendments became law June 18, 1970.

6. That the exhibits and verified Complaint is the evidence in this case, and the Conclusions of Law hereinafter set forth and made by this Court is the law of the case.

## CONCLUSIONS OF LAW

1. Our Court of Appeals has held in *Russman* v. *Luckett,* Ky. 391 S.W. 2d (1965) that all property for purposes of taxation must be assessed at One Hundred (100) per cent of its fair cash value.

The Court found:

> "It is not only admitted but has become a matter of common knowledge that real estate and tangible personal property in Kentucky are assessed for tax purposes at varying percentages substantially less than 100 per cent of fair cash value. The record indicates that in different taxing districts such property is assessed at percentages ranging from 33 to 12½ per cent of such value. The statewide median real estate assessment ratio is approximately 27 per cent."

2. The "Roll Back" statute had the effect of freezing the ad valorem tax rates and ratios in the respective districts to that which they were before Russman v. Luckett and the adoption of the "Roll Back" statute. Thus the rate and ratio percentages which ranged from 33 to 12½ per cent were frozen with the exception of allowing two ten (10) per cent increases and a net assessment growth. A taxing district which had a rate or ratio of fifteen (15) per cent before the "Roll Back"

statute was adopted is thus prevented from ever having a tax rate as high as a district which had a rate or ratio of thirty (30) per cent before the passage of the "Roll Back" statute. Therefore, equality and uniformity does not exist between the respective counti . cities and school districts within the Commonwealth of Kentucky and do not exist as long as the "Roll Back" statute is in effect.

This condition is amply proved by the numerous exhibits attached to the Complaint showing the assessment rates and ratios between the respective school districts in the years 1965-1966 through 1969-1970. For example, Adair County has a rate of 34.5 cents for the year 1969-1970, and Bullitt County has one of 55.5 cents. Christian County has one of 35.08 cents, and the Campbell County districts range from 51.4 cents to 91.7 cents. Jackson County has a rate of 33.7 cents, and LaRue County has one of 49.4 cents. Morgan County has a rate of 36.6 cents, and Montgomery County has one of 44.1 cents.

The Plaintiffs complain that because these rates are frozen and because the freeze has been occasioned by the "Roll Back" statute that the statute conflicts with several important constitutional provisions contained in the Kentucky and Federal Constitutions. Plaintiffs claim that the statute violates Sections 59 and 60 of the Kentucky Constitution in that the General Assembly has adopted a special law where a general law can be made applicable and that the act exempts without reason or basis certain school districts from the operation of a general act by a special act. (The basis for this contention is that a general statute, KRS 160.475 Sec. 1 permits an ad valorem tax levy

on each One Hundred ($100.00) Dollars of property subject to local taxation of not more than $1.50 annually subject to taxation, and there is no way that all taxing districts can come into the class equally because the "Roll Back" statute freezes the rate.) Plaintiffs also contend that the "Roll Back" statute violates Section 171 of the Constitution of Kentucky which requires that the levy and collection of taxes shall be by general laws and shall be uniform because of the patent disparity between the various districts. Plaintiffs further contend that the "Roll Back" statute violates Section 172 of the Constitution of Kentucky because it prevents as a practical matter property being assessed and taxed at its fair cash value. Various other attacks are made on this statute, however, the court will limit these conclusions of Law to the aforementioned constitutional provisions.

3. Various cases have gone to the Kentucky Court of Appeals relative to the procedural aspects of the "Roll Back" statute, but to our knowledge no case has gone to the Kentucky Court of Appeals or has one been decided where the contentions made in this lawsuit were asserted. For example, see *Mullen* v. *Board of Education of Harrodsburg Independent School District*, 440 S.W. 2d 261, where Judge Palmore in a concurring opinion states that he does not think the "Roll Back" legislation was valid in the first place. In *Rea* v. *Gallatin County Fiscal Court*, Ky. 422 S.W. 2d 134, Judge Steinfeld in speaking for the Court observed that they were not passing upon any constitutional questions not directly raised in the case.

4. In Kentucky no special or local law is valid where a general one can or could be made applicable, Ky. Const. Sec. 59, nor can a general law be made special by amendment or partial repeal. Ky. Const. Sec. 60. It goes without saying that the General Assembly could easily set maximum tax rates (without referenda) for taxing districts on some other basis than historical local fortuity or prior unlawful local practice. A law may be general (as opposed to special or local) and apply only to a class if the method for selecting the class is inherently reasonable and if that method also has a reasonable relation to the subject matter of the law. E.g., *Community Hosp.* v. *Barren County Fiscal Court,* 244 Ky. 672, 52 S.W. 2d 896 (1932) (inherent reasonableness), Mannini v. McFarland, 294 Ky. 837, 172 S.W. 2d 631 (1943) (classification system must have reasonable relation to subject of law), and *City of Louisville* v. *Klusmeyer,* 324 S.W. 2d 831 (Ky. 1950).

A general restriction on the rule of inherent reasonableness is that the "classification must be prospective and permit the future entrance into the class when its qualification and standards have been met." 2 Sutherland, *Statutory Construction* Sec. 2106 at 20 (3d ed. Horack 1943). Obviously, no taxing district now can change the amount of local property tax revenue it received in 1965.

The Court concludes that the widely varying maximum ad valorem tax rates that boards of education may employ without a referendum are allowed by laws that are contrary to Ky. Const. Sections 59 and 60.

5. We are of the opinion that the "Roll Back" statute was designed by the State Legislature to offer some relief to the tax payer because of the sudden violent impact of the Court's decision in Russman v. Luckett, supra. However, it is in conflict with the spirit of Section 172 of the Constitution of Kentucky in that while it requires assessment on the basis of fair market value it does cause an inequity in the ultimate taxes in the various taxing districts of the State.

6. As the Court understands it the various Boards of Education in the State today are precluded from any increase in taxes other than the ten (10) per cent plus ten (10) per cent increase plus the natural increase in the valuation of the assessed property. This would have the effect of ultimately preventing the various school boards from maintaining a reasonable system of education in accordance with the Kentucky Statutes.

7. The "Roll Back" statute conflicts with Section 171 because the school taxes within the Commonwealth are not levied and collected uniformly and by a general law. Equality of taxation is required by Section 171 of the Kentucky Constitution. See *George* v. *Scent,* Ky., 346 S.W. 2d 784, and this rule applies to the rate or amount of tax imposed. *City of Harrodsburg* v. *Devine,* Ky., 418 S.W. 2d 426.

8. The Court concludes KRS 160.470 is unconstitutional and invalid.

## JUDGMENT

Entered in Court, December 9, 1970

The Court having heard the arguments of counsel, considered the pleadings and exhibits and being other-

wise sufficiently advised, IT IS NOW THEREFORE ORDERED AND ADJUDGED,

1. The Defendant are mandatorily enjoined to adopt and pass the ordinances described in this Complaint as Plaintiffs' Exhibit C.

2. Chapter 160.470 popularly known as the "Roll Back" staute is unconstitutional and void.

3. The amount of money involved in this controversy exceeds the sum of Two Thousand Five Hundred ($2,500.00) Dollars.

4. That Plaintiffs recover their costs herein expended.

5. This is a final judgment, and there is no just reason for delay.

/s/ Lyndon Schmid
Lyndon Schmid, Judge

**Rendered June 18, 1971**

COURT OF APPEALS OF KENTUCKY

Charles H. Miller, et al., etc.
Board of Aldermen of Louisville,
Kentucky, et al. - - - - - - Appellants

v.

Sherrell Nunnelley, et al., etc.
Board of Education of Louisville,
Kentucky, et al. - - - - - - Appellees

Appeal from Jefferson Circuit Court
Chancery Branch, Third Division
Honorable Lyndon Schmid, Judge

**OPINION OF THE COURT**
**BY COMMISSIONER CULLEN**
**REVERSING**

Under KRS 160.470 the Board of Education of the City of Louisville Independent School District submitted to the board of Aldermen of Louisville the district's budget for the 1970-71 school year. The budget called for the levy of a basic property tax rate 10 cents per $100 in excess of the rate authorized by the "Roll-Back" law, KRS 160.470 as amended by Section 3 of Chapter 2 of the Acts of the First Extraordinary Session of 1965, and KRS 132.023. The Board of Aldermen refused to levy the tax at the rate requested, on the ground that to the extent of the excess over the "Roll-Back" limit it was illegal. The board did, however, levy a school tax at the maximum rate authorized by the "Roll-Back" Law. The Board of Education then brought the instant action against the Board of Aldermen, seeking a declaration of rights and a mandatory injunction compelling the Board of

aldermen to levy the tax requested by the Board of Education. The circuit court held the "Roll-Back" law unconstitutional and entered judgment granting the mandatory injunction asked for by the Board of Education. However, the court suspended the injunction pending this appeal, which was taken by the Board of Aldermen.

On the appeal, in addition to the briefs of the parties, we have had the benefit of amicus curiae briefs from the Kentucky Farm Bureau Federation (opposing the judgment) and from the Kentucky Education Association and the Kentucky School Boards Association (supporting the judgment). It is perhaps worthy of note that no *taxpayer* is here, either as a party or as amicus curiae.

The circuit court held that the "Roll-Back" law violated Sections 59, 171 and 172 of the Kentucky Constitution. The appellee Board of Education and the amicus curiae School Boards Association and Kentucky Education Association argue of course that the holding is correct, and the School Boards Association further argues that the law violates the equal protection clause of the Fourteenth Amendment to the United States Constitution. The appellant Board of Aldermen and the amicus curiae Farm Bureau Federation maintain that the law is constitutional in all respects.

A brief recitation of the history of the "Roll-Back" law is called for.

Prior to the enactment of the "Roll-Back" law each school board had the option, under KRS 160.475, of selecting a basic property tax rate anywhere between the minimum of 25 cents and the maximum of $1.50, per $100 of assessed valuation. Immediately

prior to the enactment of the "Roll-Back" law the great majority of school boards had selected the maximum, so the *rate* among the districts were substantially uniform in amount as a result of the selection. The impact of the rate (or the *effective* rate) varied greatly among the districts, however, because there were a great variety of *assessment ratios* (ratio of assessed value to actual value). The ratios ranged from a bottom of 20.02 percent to a top of 45.62 percent. The state-wide average ratio was 30.14 percent.

In Russman v. Luckett, Ky., 391 S.W. 2d 694, this court held that the requirement of Section 172 of the Kentucky Constitution, that all property not exempted from taxation shall be assessed for taxation at its fair cash value, must in the future be enforced and complied with. This decision presented the prospect that the base of taxable wealth on which school tax rates were levied would be more than tripled, statewide, by the raising of assessments from 30.14 percent of fair cash value to 100 percent of fair cash value. This would mean that if the school tax *rates* remained the same as before the raise, the amount of revenue derived from the taxpayers also would be more than tripled (again state-wide). This prospect led to the enactment of the "Roll-Back" law.

In simplified form (omitting reference to some features not essential to this opinion) the "Roll-Back" law as applied to school taxes, KRS 160.470, provides that no school district shall submit a budget which would require more revenue from local ad valorem taxes than was produced in 1965, exclusive of *voted* taxes and net assessment growth from new property. The practical effect of this law was to freeze the basic tax rate in each school district at the *effective* rate

(the actual rate multiplied by the assessment ratio) the district had in 1965. This is the feature on which the circuit court held the law unconstitutional.

The holding of unconstitutionality, and the argument made on this appeal in support of that holding, rest primarily on the proposition that since the *effective tax rates* in 1965 were the result of *assessments* that did not conform with Section 172 of the Kentucky Constitution, the practical effect of freezing those rates is to perpetuate the unconstitutional assessment ratios, thus continuing the violation of Section 172 and completely frustrating the holding in Russman v. Luckett. We believe the proposition is not valid, for the reason hereinafter stated.

It is true that the basic tax rate that a school *board* has the power itself to select is frozen. The taxing power of the *district*, however, is not frozen, because under KRS 157.440 a district, by *popular vote,* can select as high a rate as it chooses. Thus, unconstitutional assessments are not perpetuated and Russman v. Luckett is not frustrated. The "Roll-Back" law does not prevent a school district from giving full effect to Section 172 and to Russman v. Luckett.

The argument of violation of Section 171 of the Kentucky Constitution is keyed to, and falls with, the argument as to Section 172. We note in passing that Section 171 makes a specific requirement of uniformity only "within the territorial limits of the authority levying the tax," and thus recognizes that the *amount* of the levy need not be the same among the different taxing districts.

The secondary argument presented in support of the holding of unconstitutionality is that the "Roll-Back" law violates Section 59 of the Kentucky Con-

stitution and the equal-protection clause of the Fourteenth Amendment to the United States Constitution. This argument narrows down to the proposition that legislation fixing among the various districts different *maximum* basic tax rates that school *boards* may select constitutes special and local legislation and denies equal protection of the law.

The "Roll-Back" law had the purpose and objective of protecting the taxpayers against sudden substantial increases in their tax burdens by action of their elected representatives. The provision of the law freezing the maximum effective rate that the representatives could cause to be levied, within each district, on the basis of each individual district's experience and history, was directly related to the accomplishment of the purpose and objective and was in fact the only method by which full accomplishment could have been achieved. Since the classification made by the legislature on the basis of experience and history thus has a reasonable basis, we cannot say that the law is special or local legislation within the prohibition of Section 59 or that it denies equal protection. Cf Commonwealth v. Griffen, 268 Ky. 830, 105 S.W. 2d 1063, in which this court upheld legislation exempting incumbent school board members from newly enacted requirements as to educational qualifications. Classifications on the basis of conditions prevailing at a particular time frequently have been upheld. See 16 Am. Jur., Constitutional Law, sec. 512, p. 897; Doller v. Reid, 308 Ky. 348, 214 S.W. 2d 584

In practical effect the "Roll-Back" law prohibits *any* local school tax not approved by *popular vote,* with a "grandfather-clause" exemption of existing taxes. This is a standard type of legislation.

*Opinion Below*

The laws under which each school district achieved or selected the effective tax rate it had in 1965 were not special or local in any regard, so the situation in which each district is placed by the "Roll-Back" law was not one into which the district was forced by any requirement of former law not applicable to all districts alike.

It is our opinion that the "Roll-Back" law, as applied to school districts is not unconstitutional in the respects adjudged by the circuit court, and that the judgment is erroneous.

The judgment is reversed with directions to enter judgment in conformity with this opinion.

Milliken, C.J., and Hill, Neikirk, Osborne, Reed and Steinfeld, JJ., concur.

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## APPENDIX C
## CONFLICTING OPINION

Rendered: June 18, 1971

COURT OF APPEALS OF KENTUCKY

Board of Education of
Jefferson County, Kentucky, etc. Appellant

v.

Board of Education of Louisville,
Kentucky, etc., et al. Appellees

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, FIRST DIVISION
HON. MACAULEY SMITH, JUDGE

### OPINION OF THE COURT
### BY COMMISSIONER VANCE
### REVERSING

At issue is the constitutionality of Chapter 189 (House Bill 158) of the Acts of the General Assembly of Kentucky at the 1970 Session now codified as KRS 160.047 and 160.049.

Before the enactment of House Bill 158, the transfer of adjacent areas from one school district to another was controlled in every county in the state by KRS 160.045. House Bill 158 exempted counties containing a city of the first class from the provisions of KRS 160.045 and created a new procedure for transferring adjacent areas from one school district to another in those counties.

The basic differences in the two procedures concern (1) the method in which a proposal to initiate a transfer may originate (2) the discretion that may be exercised by school administrative authorities regarding the propriety of a transfer, and (3) the mechanics of adjusting and settling equitable terms for the transfer.

Following the enactment of House Bill 158 a petition was filed with the Jefferson County Fiscal Court seeking the transfer of a described area from the Jefferson County School District to the Louisville Independent School District. The fiscal court referred the petition to the Board of Registration and Purgation to determine if the requisite number of voters had signed the petition.

At this juncture, the Jefferson County Board of Education filed this action attacking House Bill 158 upon two constitutional grounds. It claimed that the Act constitutes local or special legislation in violation of Section 59 and 60 of the Constitution of Kentucky and that the Act runs afoul of the separation of powers doctrine in that it imposes upon the judiciary a non-judicial function.

The pertinent parts of Section 59 of the Constitution read as follows:

> "The General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes, namely: * * *.
>
> "25. To provide for the management of common schools. * * *.
>
> "29. In all other cases where a general law can be made applicable, no special law shall be enacted."

Section 60 of the Constitution provides:

> "The General Assembly shall not indirectly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act any city, town, district or county; * * *."

These provisions of the Constitution clearly prohibit any local or special act with reference to the management of public schools or in any case where a general law can be made applicable.[1] Likewise the General Assembly is prohibited from indirectly enacting special legislation by the exemption of a county from the operation of a general law.

A local act is one confined to territorial limits other than that of the whole state or one which is applicable to some political subdivision and not to others. A special law is legislation which arbitrarily or beyond reasonable justification discriminates against some persons or objects and favors other. City of Louisville v. Klusmeyer, Ky. 324 S.W. 2d 831 (1959).

Nevertheless, the General Assembly may indulge in class legislation if the classification is made to depend upon natural, real or substantial distinctions, inhering in the subject matter, such as suggest the necessity for or propriety of independent legislation in regard to the class specified. A classification based upon purely artificial, arbitrary or fictitious conditions is unreasonable and will not be permitted. Reid v. Robertson, 304 Ky. 509, 200 S.W. 2d 900 (1947).

Section 156 of the Constitution of Kentucky permits classification of cities upon the basis of size alone for the purpose of their organization or government and matters relating thereto. In other cases classification of cities and counties by size and population is

[1]Although Section 183 of the Kentucky Constitution provides that the General Assembly shall, by appropriate legislation, provide for an efficient system of common schools, we have held that such legislation is not appropriate if it contravenes another constitutional provision of equal dignity. Board of Education of Louisville v. Board of Education of Jefferson County, Ky., 458 S.W. 2d 6 (1970).

permissible only if the size and population of itself has an appreciable relevancy to the subject matter of the legislation. Mannini v. McFarland, 294 Ky. 837, 172 S.W. 2d 631 (1943); James v. Barry, 138 Ky. 656, 128 S.W. 1070 (1910); Droege v. McInerney, 120 Ky. 796, 87 S.W. 1085 (1905) and City of Louisville v. Klusmeyer, supra.

The repeated attempts of the General Assembly to enact legislation applicable to only a portion of the state based upon a classification of cities or counties containing cities of a specified class have precipitated a great volume of litigation. In James v. Barry, supra, and Mannini v. McFarland, supra, this court reviewed the various factors relating to proper classification for legislative purposes. We said in James v. Barry and quoted with approval in Mannini the following:

> " 'For certain purposes classification by population and its density are not only natural and logical, but any other basis would be unscientific and unsatisfactory. * * * But it was always pointed out, or plainly to be seen, that the legislation was also of a class which it was legitimate to classify upon the basis of population. On the other hand, instances have occurred where it was attempted to classify subjects by the sizes of cities where the question of the density of population had no appreciable relevancy to the subject. Such, for example, making a statute of six-month limitations to actions of tort or for salaries against a city of the first class, whereas the general law was one year, or five years. City of Louisville v. Kuntz, 104 Ky. 584, 47 S.W. 592. * * *

> "'When the subject-matter is purely one of municipal government, it is clearly competent for the Legislature to classify it alone upon number and density of population, as the Constitution implies if it does not expressly allow. When the subject is one that reasonably depends upon or affects the number and density of population as a correlative fact in the scheme of the particular legislation, then such classification is allowable. There are even perhaps other instances justifying such classification. But where the subject is one of general application throughout the state, and has been so treated in a general scheme of legislation, distinctions favorable or unfavorable to particular localities, and rested alone upon numbers and density of population, are invidious, and therefore offensive to the letter and spirit of the Constitution. * * *.'"

In every instances when legislation is made applicable to a defined class, a question arises as to whether the classification of the objects of the legislation is reasonable and proper. As is often the case, it is impossible to formulate any one rule which is broad enough to cover all the various situations which may be presented. Of necessity each classification must be considered in the light of the facts peculiar to it.

The legislative classification in this case is by counties and those counties containing a city of the first class are placed in a separate classification. The object of the legislation is to provide a method for the transfer of adjacent areas from one school district

to another. Whether the classification is reasonable and proper depends upon the determination of this question: "Does a county which has within its boundaries a city of the first class have such different circumstances and problems relating to the transfer of adjacent territories from one school district to another as to reasonably justify a separate procedure for such transfers applicable exclusively in such counties?" Reference to the Act in question clearly establishes that it provides a procedure for transferring areas from one school district to another in counties containing a city of the first class which is separate and distinct from the procedure which must be used in all the other counties.

Let us look at the differences in the procedure.

| TRANSFERS IN COUNTIES NOT CONTAINING A CITY OF THE FIRST CLASS. | TRANSFERS IN COUNTIES CONTAINING A CITY OF THE FIRST CLASS. |
|---|---|
| 1. The proposal to transfer territory may be initiated by either of the affected school boards or by petition of seventy-five percent of either the registered voters or property owners within the area. | 1. The proposal to transfer can be initiated only by filing a petition with the fiscal court containing signatures of twenty-five percent of the registered voters of the area. The affected boards of education may not initiate a proposed transfer. |
| 2. If the boards of education of the affected districts fail to agree, either board may petition the Superintendent of Public Instruction for approval of the transfer. If the Superintendent of Public Instruc- | 2. If the petition is valid the matter shall be submitted to a vote and if approved by the voters of the area, the transfer shall be made. Neither of the affected boards of education nor the Superintendent |

tion is unable to arrive at a satisfactory agreement with the two boards, either board may request that the matter be brought before the State Board of Education for hearing.

of Public Instruction is permitted any discretion as to the propriety of the transfer. Once the transfer is mandated by the voters, if the affected boards of education cannot agree upon the terms of the transfer, the matter is submitted to the courts for settlement upon equitable terms.

What circumstances prevail in counties containing cities of the first class which justify a separate procedure? The appellee contends that the size of first-class cities creates special problems in that the growing population necessitates the creation of new schools and adequate space to locate new schools is not available within the limited boundaries of the independent school district. The location of new schools outside the district frequently leads to petitions for transfer of the area into the district.

Appellee also contends that the magnitude of the problems which must be faced in settling the terms of transfer of an area between a county and an independent school district is much greater in counties which contain a city of the first class than in other counties.

It may be conceded that the size and the growth of the population in counties containing cities of the first class may necessitate the transfer of adjacent areas from one school district to another more frequently than elsewhere but the fact that the problem arises more often does not of itself indicate that the general law enacted to deal with the problem is in-

adequate. Granted also that the magnitude of problems encountered in settling the terms of the transfer is greater, yet there is no showing that the administrative machinery for settling the terms of the transfer through the office of the Superintendent of Public Instruction and the State Board of Education as provided by the general law is inadequate. Cf. Nuetzel v. State Tax Commission, 205 Ky. 124, 265 S.W. 606 (1924).

If it is proper for the boards of education, Superintendent of Public Instruction and the State Board of Education to exercise some discretion regarding the propriety of transfers of adjacent territory from one school district to another in all counties except those containing a city of the first class, what circumstances are so different as to justify depriving those agencies of that discretion in counties containing a city of the first class? We see none.

On the other hand if it is proper to allow the voters of an area to determine the propriety of the transfer in some counties, what are the circumstances that make it improper for the voters to have this option in all other counties? We see none.

Neither the size nor population of the area nor the fact that the problem may occur more frequently in the more populous areas has any natural relationship to the object of the legislation. House Bill 158 violates both Sections 59 and 60 of the Constitution. It creates a procedure which is limited without any reasonable basis to counties containing cities of the first class when it could have been made universally applicable throughout the state. It is thus local in nature. It

also exempts counties containing a city of the first class from the operation of a general law without any sufficient or reasonable basis for such exemption and thereby violates Section 60 of the Constitution.

The statute is subject to the further vice that a county containing a city of the first class may also contain a city of some other class with an independent school district. Thus an independent school district in a fourth-class city in Jefferson County would be required to use an entirely different procedure to annex adjacent areas to its independent school district from the procedure used by independent school districts in fourth-class cities in all the remaining counties in the state. No justification for this disparity has been suggested.

The appellee relies upon Sims v. Board of Jefferson County, Ky., Ky., 290 S.W. 2d 491 (1956) and Board of Education v. Mescher, 310 Ky. 453, 220 S.W. 2d 1016 (1949). These cases are not controlling. In Mescher the statute prescribed procedures for annexation by school districts in cities of the fifth and sixth classes. Before the case was decided, the Act was amended and became applicable to cities of all classes.

In Sims, a tax for school purposes limited in application to schools in counties containing a city of the first class was sustained upon the basis that the need for additional revenue was substantially greater in such counties. In that case size and growth of population peculiar to counties containing first-class cities were determined to be so relevant to revenue requirements as to justify legislation for that particular classification, whereas no such relevancy exists be-

tween the size of the county and the procedure for annexation in school districts. The relevant considerations are the same in small and large communities. That this is true is indicated to some extent by the fact that the Superintendent of Public Instruction is required by KRS 160.045(2) to give consideration to precisely the same factors in approving transfers in every county that the courts are required to consider in determining equitable terms for transfer in counties containing a city of the first class pursuant to the provisions of House Bill 158.

Since the judgment must be reversed upon the basis of the improper classification, we do not deem it necessary to review the question of whether the Act unconstitutionally imposes nonjudicial functions upon the judiciary.

The judgment is reversed with directions that a new judgment be entered consistent with this opinion

Milliken, C.J., and Osborne, Reed and Hill, J.J., concur.

Individual dissenting opinions by Palmore and Steinfeld, J.J., Neikirk, J., joins in the dissents.

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*Opinion of Court of Appeals of Kentucky*
*Bd. of Ed. of Jefferson Co. v. Bd. of Ed. of Louisville*

Rendered: June 18, 1971

COURT OF APPEALS OF KENTUCKY

Board of Education of
Jefferson County, Kentucky, etc. Appellant

v.

Board of Education of Louisville,
Kentucky, etc., et al. Appellees

APPEAL FROM JEFFERSON CIRCUIT COURT
CHANCERY BRANCH, FIRST DIVISION
HON. MACAULEY SMITH, JUDGE

**DISSENTING OPINION BY JUDGE PALMORE**

If the legislature may validly classify each of 200 or so different school districts solely on the fortuitous basis of what its individual tax assessment may have been at a given time prior to *Russman* v. *Luckett,* Ky., 391 SW 2d 694 (1965), as today held in *Miller* v. *Nunnelley,* Ky., ___ SW 2d ___ (1971),[1] I see no constitutional reason why it may not provide for Jefferson County, upon the basis of its density of population, a special method of changing school district boundaries.

If *City of Louisville* v. *Commonwealth,* 134 Ky. 488, 121 SW 411 (1909), in which a statute pertaining to school taxes in Louisville alone was held not to be special legislation, is still good law it seems to me that the same reasoning applies to legislation dealing with school district boundaries. I doubt the wisdom of this

[1]That such a classification exists with regard to the maximum tax rates permitted the various school districts is not made less so by the fact that an escape hatch is available in the form of a public vote.

statute, and I am not free of doubt on the constitutional point, but it is not a court's province to pass on the wisdom of a legislative act, and mere doubt as to its constitutionality must be resolved in favor of the legislature.

I therefore join with Judges Steinfeld and Neikirk in dissenting.

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(Another dissenting opinion, by Judge Steinfeld, has been omitted.)

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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term 1971

No. 71-383

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SHERRELL NUNNELLEY, et al., etc.
BOARD OF EDUCATION OF LOUISVILLE,
KY., et al. - - - - - - - - Petitioners

*versus*

CHARLES H. MILLER, et al., etc.
BOARD OF ALDERMEN OF LOUISVILLE,
KY., et al. - - - - - - - - Respondents

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ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF KENTUCKY

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## RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

# SUPREME COURT OF THE UNITED STATES

**No. 71-383**

**October Term 1971**

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BOARD OF EDUCATION OF LOUISVILLE, KY., et al. - - - - - - - *Petitioners*

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

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## RESPONDENTS' BRIEF IN OPPOSITION

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### ARGUMENT

This is a controversy turning on a question of Kentucky law which does not involve any issue arising under the Federal Constitution. The Board of Education of Louisville, Kentucky, Petitioner herein, a state agency created by statute, challenges the authority of its creator to impose limitations upon those powers which it had been granted.

The enactment by the Kentucky Legislature of Kentucky Revised Statute 160.470(2) (Pet. 17a and 18a),

prohibits this Petitioner with certain exclusions from submitting a budget which would require more revenue from local ad valorem taxes than would be produced by application of the preceding year's rate to the preceding year's assessment.

The limitation contained in this section of the statute is the crux of this action. The effect of this legislation, contained in KRS 160.470(2) limits the demands the Board of Education can make upon the tax levying authority.

Section 183 of the Constitution of the Commonwealth of Kentucky provides that "The General Assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state."

How the General Assembly shall best accomplish this objective has been declared by our Kentucky Court of Appeals to be purely a matter of legislative discretion. *Elliott, et al.* v. *Garner, et al.,* 140 Ky. 157, 130 S. W. 997 (1910).

Consistent with the mandate of the people of the Commonwealth of Kentucky, as contained in the Constitution, the legislature created boards of education and granted to them general control and management of the public schools. KRS 160.160, 160.290 (Pet. 11a, 15a).

In Kentucky Revised Statutes 160.470(1) (Pet. 17a) the legislature empowered the board of education, among other things, to prepare a general school budget, showing the amount of money needed to be raised by local taxation, including the rate of levy necessary to

raise such an amount for the operation of the schools in its district during the succeeding fiscal year. By Subsection (2) thereof, the legislature has limited the power of the board of education, by restricting the amount of revenue it can demand to be raised by local taxation.

It is significant that KRS 157.440 (Pet. 9a), provides a method to overcome the limitations imposed upon the Petitioners by KRS 160.470(2), by submitting the matter of increased taxes to the qualified voters of the district. In addition, our Kentucky Court of Appeals has held in *Holmes* v. *Walden,* Ky., 394 S. W. 2d 458 (1965), that the limitation imposed upon the board of education may be exceeded when a higher rate is necessary for the district school program to participate in the minimum foundation program as provided for in KRS 158.380.

The whole subject of common school education is confided to the judgment of the General Assembly by the Constitution, and as stated by our Kentucky Court of Appeals in the case of *Prowse, et al.* v. *Board of Education of Christian County,* 134 Ky. 365, 120 S. W. 307, 309 (1909):

> "It [the General Assembly] may create such agencies as it deems proper to carry out the provisions of the Constitution. The General Assembly comes fresh from the people. After a short session of 60 days, it returns to the people, and if any measures conceived by it to provide an efficient system of common schools throughout the state, shall not prove satisfactory to the people, they have ample remedy in their own hands to correct the evils."

The state has a right to govern through such agencies as it may choose. *Duke, et al.* v. *Boyd County,* 255 Ky. 112, 7 S. W. 2d 839 (1928). The state, in this instance, created the board of education to accomplish its objective in providing for an efficient system of common schools throughout the state. The petitioning Board of Education herein, being an agency created by statute and invested only with powers expressly conferred upon it, cannot claim powers granted to it by statute and only by statute, and attack as unconstitutional the limitations imposed upon that power by the same statute.

The State, and its legislative body conforming its action to the State Constitution, may at its pleasure modify or withdraw all of the powers of the Petitioners. As a board or agency created by the state to enable it to perform certain governmental duties, the Petitioners have no standing to attack the statute, which is only a limitation of its powers enacted and granted to it by the state which created it.

The policy, system, justice or fairness of the statute under consideration are questions for the consideration of those to whom the state has entrusted its legislative power. The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it. *Hunter* v. *Pittsburgh,* 207 U. S. 161, 28 Sup. Ct. 40, 52 L. Ed. 151 (1907); *Williams* v. *Mayor and City Council,* 289 U. S. 36, 53 S. Ct. 431, 77 L. Ed. 1015 (1933); *Risty* v. *Chicago, R. I. & P. Ry.,* 270 U. S. 378, 46 S. Ct. 236, 70 L. Ed. 641 (1926);

*City of Trenton* v. *New Jersey*, 262 U. S. 182, 43 S. Ct. 564, 67 L. Ed. 937 (1923).

Kentucky has provided and determined the powers, methods and procedures which it thought proper and necessary to provide an efficient system of schools and the safeguards which it thought necessary to protect against abuse.

## CONCLUSION

It is difficult to conceive how an attack by a state agency upon its creator, challenging its authority to limit its powers, can come within the ambit of the Fourteenth Amendment of the Constitution. Accordingly, it is respectfully submitted that a petition for writ of certiorari be denied.

Respectfully submitted,

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